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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1608

STATE OF MICHIGAN,
Petitioner,

v.

LOREN TYLER and ROBERT TOMPKINS,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT [redacted] OF MICHIGAN

PETITIONER'S BRIEF

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PETITIONER'S BRIEF

OPINIONS BELOW

The opinion of the Michigan Supreme Court is reported at 399 Mich 564; 250 NW2d 467, and is printed at page 17 of the petition for certiorari. The opinion of the Michigan

Court of Appeals is reported at 50 Mich App 414; 213 NW2d 221, and is printed at page 36 of the petition.

JURISDICTION

The decision of the Michigan Supreme Court was filed on February 14, 1977. The petition for a writ of certiorari was timely filed on May 16, 1977, and was granted on October 3, 1977. The jurisdiction of this Court is invoked under 28 USC §1257 (3).

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision involved in this case is the Fourth Amendment:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable [redacted] shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

QUESTIONS PRESENTED

I.

WHETHER A WARRANTLESS SEARCH OF FIRE-DAMAGED PREMISES TO DETERMINE THE CAUSE OR ORIGIN OF THE FIRE, CONDUCTED OR CONTINUED AFTER THE FIRE HAS BEEN EXTINGUISHED AND AT THE FIRST OPPORTUNITY TO MAKE A DAYLIGHT VISUAL INSPECTION, IS CONSTITUTIONALLY PERMISSIBLE?

II.

WHETHER A WARRANTLESS SEARCH OF FIRE-DAMAGED PREMISES TO GATHER EVIDENCE OF THE CAUSE OR ORIGIN OF THE FIRE, CONDUCTED UNDER CIRCUMSTANCES WHICH INDICATED THAT THE OCCUPANT HAD NO EXPECTATION OF PRIVACY IN THOSE PREMISES, WAS CONSTITUTIONALLY PERMISSIBLE, NOTWITHSTANDING THAT NO EXIGENT CIRCUMSTANCES EXISTED, THAT OFFICERS HAD WITHIN THEIR KNOWLEDGE FACTS UNQUESTIONABLY SHOWING PROBABLE CAUSE, AND THAT OFFICERS HAD AMPLE TIME TO GET A SEARCH WARRANT?

III.

WHETHER THE PROSECUTION SHOULD BE ENTITLED TO A DECISION ON THE MERITS OF A QUESTION OF STANDING AT ANY STAGE OF THE CRIMINAL PROCEEDINGS?

STATEMENT OF FACTS

Loren Tyler and Robert Tompkins were convicted of conspiracy to burn real property. Tyler was also convicted of burning real property and burning insured property with intent to defraud.

The fire occurred at Tyler's Auction in Waterford Township, Michigan, a building leased by Tyler where he conducted a retail furniture business (R.210-213). Tompkins was a business associate of Tyler's (R.1144-1155, 1237).

Physical evidence, taken by fire and police officials without a search warrant from the premises after the fire had been extinguished, was admitted at the trial over objection. (A.20-23, 57-60)

The fire began with two loud explosions shortly before midnight on January 21, 1970 (R.69-70). The fire department arrived shortly thereafter. Fire Chief See discovered and seized two plastic containers, one partially filled with a flammable liquid, before the firefighters left (A.8-10). Respondents did not challenge the admissibility of that evidence in the Court below.

Chief See conferred with Detective Webb of the police department at the scene shortly before the firefighters left. Webb's efforts to take pictures of the interior of the building were unsuccessful due to a malfunctioning camera and the fact that the building was filled with smoke and steam. (A.24-27).

By 4:00 a.m. on January 22 the fire was extinguished. The premises were thereafter left unattended until 8:00 a.m. when See returned with Assistant Fire Chief Somerville and together they briefly surveyed the area (A.16-18, 23-24).

Most of the interior of the building and all the furnishings and fixtures had been almost completely consumed by fire. Almost all that remained were metal parts of furniture. The acoustical ceiling had fallen onto the floor, and the steel support beams above were twisted and had all been very badly damaged by heat and fire (A.18-19). However, the northwest and northeast sections of the building were not as badly damaged. Though all the furniture fabric had been destroyed, a few pieces of

wooden framework were merely scorched and damaged by smoke, and there were some business records on the floor which had not been completely destroyed (A.51, 56-57).

Assistant Chief Somerville, who did not know the identity of the landlord and had been informed that the tenant was in Florida (A.22), returned with Detective Webb between 9:00 and 9:30 a.m. and discovered pieces of tape along a thin linear burn mark in the carpet of one room (A.19, 27-28). The burn circled the room, went through a door, and continued down a stairway to an exit. Pieces of carpet and wood containing the burn marks were removed, and the trial admitted over objection (A.19-23).

Four days later, on January 26, Sergeant Hoffman of the Michigan State Police, Arson Section, took photographs of the interior of the building which were lost in the mail (A.47-48).

On January 29, Hoffman and Somerville met with Respondent Tyler at the fire station. Tyler was advised of his Miranda rights, and agreed to talk with the officials (A.54-55). After having been informed of the condition of the burned building, Tyler gave the opinion that arson must have occurred (A.55-56). Following a brief discussion of insurance and the contents of the building, Tyler agreed to go with the officials to survey the scene of the fire, where he pointed out various missing articles (A.55-57). No photos were taken or evidence seized at that time.

Sergeant Hoffman returned without Tyler three weeks later, on February 16, and took more photographs, which were admitted at trial without objection (A.48-49). He

also found a piece of fuse and pieces of glass and other debris, which were admitted over objection (A.50, 57-60).[1]

Oscar Frisch, a part-time employee of Respondent Tompkins (A.32-33), was the principal witness tending to establish Respondents' guilt. He first inculpated Respondents in a conversation with Detective Webb on January 31, 1970 (R.265), and repeated "basically" the same story thereafter (R.322). He testified at trial (A.32-46) that for two days prior to the fire, he and Respondents moved nearly everything of value out of the store and delivered the merchandise either to buyers or to warehouses (A.33-37). During this period they filled the store with truckloads of worthless furniture (A.33-39) as well as cardboard they had been collecting since December to facilitate the burning (A.39-42; R.457-458).

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[1] The fact that Respondents in the court below challenged only the admissibility of Exhibits 5-11, obtained on January 22, 1970, and Exhibits 54-61, obtained on February 16, 1970 (Appellant's Brief Below, p. 3), tends to obscure the actual scope of the investigation in this case. In addition to the entrances onto the premises mentioned above, a furnace repairman inspected the furnace with Detective Webb on an unspecified date "right after the fire" (A.66-67). A television repairman examined the remains of television sets in early February in the company of Webb and Hoffman (A. 64-66). Although the photographs taken by Hoffman on January 26 were lost in the mail, it is apparent that his opinion that the fire was the result of arson was based at least in part upon observations he made on that date (R. 748-749). Most items of evidence that were removed, as well as the furnace and pieces of cardboard, were checked for fingerprints (A.50; R. 249-250). And both Webb and Hoffman examined certain records that were not destroyed sufficiently to determine that they belonged to the landlord, not to Tyler (A. 30; R. 798). Regardless of whether the constitutionality of these additional searches has been preserved for appeal, they are relevant to the general obtrusiveness of the investigation.

All items of disputed evidence tended to show that the fire had been deliberately set, but none tended to identify the perpetrator.

SUMMARY OF ARGUMENT

Fire officials have a duty to investigate the cause or origin of fires. Once a fire has been extinguished, the officials are faced with two possibilities as they begin their investigation. Either the occupant burned his own premises, or the fire was caused accidentally or by malicious arson.

If the former, the occupant's actions show that he has no expectation of privacy in his burned premises. By deliberately instigating so massive a disruption and invasion he has abandoned those premises within the meaning of the Fourth Amendment. The concepts of arson for profit and of Fourth Amendment protection of the burned premises are wholly incompatible.

If the fire was accidental or the result of malicious arson, the occupants of the premises are treated as victims by police and fire officials. The likelihood that they will be aggrieved by a possible intrusion into what little remains of their privacy in badly-burned premises is negligible. That privacy will not be protected by an administrative search warrant, which should issue whenever a fire has occurred. In addition, a fire is so readily ascertainable a fact that the judgment of a disinterested magistrate should not be necessary to determine its occurrence.

Once abandonment has been shown, a reentry into burned premises violates no constitutionally protected interest. This Court has never required the judgment of a

disinterested magistrate to determine whether a proposed investigation intrudes upon a protected area, only to determine when the right of privacy must yield to the right to search.

Finally, if Petitioner's arguments on the search and seizure questions are not accepted, we contend that in order to avoid the serious injustice of a retrial of Respondent Tompkins identical to his original trial in all constitutional respects, a hearing pursuant to *Simmons v. United States*, 390 US 377 (1968), should be ordered. If Tompkins cannot show standing, the judgment of conviction should be reinstated.

ARGUMENT

I.

A WARRANTLESS SEARCH OF FIRE-DAMAGED PREMISES TO DETERMINE THE CAUSE OR ORIGIN OF THE FIRE, CONDUCTED OR CONTINUED AFTER THE FIRE HAS BEEN EXTINGUISHED AND AT THE FIRST OPPORTUNITY TO MAKE A DAYLIGHT VISUAL INSPECTION, IS CONSTITUTIONALLY PERMISSIBLE.

The Michigan Supreme Court, in an opinion reversing Respondents' convictions, extended the Fourth Amendment warrant requirement by holding that fire and police officials need an administrative search warrant under *Camara v. Municipal Court*, 387 US 523 (1967), and *See v. Seattle*, 387 US 541 (1967), before searching fire-damaged premises for the cause of the fire once it

has been extinguished. The opinion was based upon this Court's distinction among regulatory, administrative, and criminal investigative searches, the rationale for which is the relative intrusiveness of each type of search. Petitioner contends that the Michigan Supreme Court's analysis is inappropriate to post-disaster investigations, which rarely deal with occupied homes and operational businesses, and which usually are conducted prior to a determination of whether a crime has occurred. But far more significant than the appropriateness of that analysis to post-fire searches in general is the fact that the court below ignored the single most important fact in any arson-for-profit case, that of the arsonist's expectation of privacy in his own burned premises.

A. AN ARSONIST WHO BURNS HIS OWN PROPERTY THEREBY ABANDONS THOSE PREMISES WITHIN THE MEANING OF THE FOURTH AMENDMENT.

One who deliberately burns premises that he owns or leases ordinarily does so to collect on a fire insurance policy, and thereby maintains a property interest in the premises which forms the basis of his claim. Petitioner concedes that this property interest is sufficient to give an alleged arsonist standing to contest any search of those premises. *Brown v. United States*, 411 US 223, 229 (1973). However, we contend that such an arsonist has by his actions shown that he has no expectation of privacy, or any other interest protected by the Fourth Amendment, in those premises. We believe that, by showing an expectation of publicity rather than of

privacy, an arsonist has come full circle to a position equivalent in all important respects to that of one who lacks standing,[2] in that searches of his premises involve no intrusion into a constitutionally protected area.

There is nothing unlawful about the search or seizure of abandoned property. *Hester v. United States*, 265 US 57 (1924); *Abel v. United States*, 362 US 217, 241 (1960). Though persons sometimes give up all property rights in goods that are determined to be abandoned for Fourth Amendment purposes,[3] "[t]he premise that property interests control the right of the Government to search and seize has been discredited." *Warden v. Hayden*, 387 US 294, 304 (1967).[4] "[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 US 347, 351 (1967); *United States v. Santana*, 427 US 38, 42 (1976). Accordingly, "the proper test for abandonment [should be] not whether

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[2] The United States Court of Appeals for the District of Columbia Circuit could "see no reason for treating a person who abandons property before the search any differently from a third party." *Parman v. United States*, 130 US App DC 188; 399 F2d 559, 565, *cert den*, 393 US 858 (1968).

[3] E.g., *United States v. Martin*, 386 F2d 213 (CA3, 1967) (narcotics discarded during chase); *Vincent v. United States*, 337 F2d 891, 896-897 (CA8, 1964) (same).

[4] A "mere trespass" or violation of local property law has never been sufficient by itself to invoke the protection of the Fourth Amendment. *Hester v. United States, supra; McGuire v. United States*, 273 US 95 (1927); *Air Pollution Variance Board v. Western Alfalfa*, 416 US 861 (1974).

all formal property rights have been relinquished, but whether the complaining party retains a reasonable expectation of privacy" in the premises alleged to have been abandoned. *United States v. Wilson*, 472 F2d 901, 902 (CA9, 1972), *cert den*, 414 US 868 (1973). We contend that one can abandon any interest protected by the Fourth Amendment without at the same time giving up all property rights in the items seized or the area searched.

It is reasonable to assume that arson for profit will always involve facts similar to those of the instant case. The arsonist has complete control over the timing of the fire, and can be presumed to have removed personal items beforehand. Anything valuable will have been removed, save for whatever might be judged necessary to lend authenticity to an insurance claim. In short, besides "literally [having attempted to sell] his building back to the insurance company because there is nobody else who will buy it,"[5] the arsonist has left his building precisely as he knows it will be found by an invading army of firemen, police, fire investigators (whether with or without a warrant), insurance adjustors, vandals, looters, and children attracted to vacant buildings, all of whom arrive at what should be regarded as the arsonist's implicit invitation.

We do not contend that arsonists therefore are so guilty that they are not entitled to basic constitutional rights intended for the protection of the guilty as well as the innocent. In all other searches not involving

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[5] The words are attributed to New York City Deputy Chief Fire Marshal John Barracato in *Time*, Vol. 110, No. 18 (October 31, 1977), p. 22.

abandonment, the subject's sanctity or right of privacy in his home, business, car, person, or effects has been invaded to some degree, and that right is wholly independent of any underlying criminal activity in which he may be engaged or of any evidence of criminal activity which he may possess. Our point is rather that arson for profit is unique in that the nature of the crime speaks directly to the arsonist's expectation of privacy in his burned premises. It says that he has none whatsoever.

We contend that this fact, standing alone, is sufficient to justify the searches in this case, as well as in every criminal case involving arson for profit. Notwithstanding that investigators may not know beforehand whether a fire was deliberately set by the owner or lessee of the premises and that they may have time to get a search warrant (whether administrative or criminal investigative), the fact remains that no constitutional right will have been violated by such a search. The threshhold question of any search and seizure case, before a decision on the merits becomes necessary, is whether the defendant has standing to raise the issue, because "it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he, himself, was the victim of an invasion of privacy." *Jones v. United States*, 362 US 257, 261 (1960).[6] The case is at least as strong for not allowing one who has abandoned his

[6] "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in wilful, or at the very least negligent, conduct *which has deprived the defendant of some right.*" *Michigan v. Tucker*, 417 US 433, 447 (1974) (emphasis added).

property or premises to benefit from a suppression of items seized from those premises. By requiring a showing of standing, evidence can be admitted notwithstanding that it may have been seized in violation of a constitutional right, albeit somebody else's. *Brown v. United States, supra.* Allowing Respondents to benefit from the suppression of evidence in this case would in effect extend the Fourth Amendment exclusionary rule to cases in which *nobody's* rights were violated, solely because fire and police officials' actions might have invaded someone's privacy under similar but hypothetical circumstances. If the decision of the court below is to stand, it should do so to protect constitutional principles that would otherwise go unprotected, or to protect people who are likely to be aggrieved by post-fire searches and who cannot readily vindicate the rights that are thereby violated.

B. VICTIMS OF ACCIDENTAL FIRES OR OF MALICIOUS ARSON ARE IN NO NEED OF PROTECTION FROM POST-FIRE SEARCHES, AND WILL RECEIVE NONE FROM ADMINISTRATIVE SEARCH WARRANTS.

Once a fire has been extinguished, fire investigators are faced with two possibilities: (1) The owner or proprietor burned the premises himself, probably to collect under an insurance policy; or (2) the fire occurred accidentally or was maliciously set. If the former, no investigation of the premises will intrude upon a constitutionally protected area for the reasons set forth *supra*, Part I.A. If the latter, the police are dealing with members of the public as victims, not as criminals or suspects, with everything that implies.

It implies that firemen and police arrive in a benevolent role and, after extinguishing the fire, investigate to find the cause or origin of that fire to further important public and private interests. If the fire is a malicious arson, it is reasonable to conclude that the victims, whether or not they are present during the post-fire search, would concur in the police and fire department's desire to process the crime scene, to gather evidence, and to apprehend and prosecute the perpetrators.[7]

If the fire is accidental, the actions of fire investigators after the fire is extinguished are fairly predictable. Once

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[7] While uncooperative victims are not unknown to law enforcement, their recalcitrance usually shows when it is time to testify, after they have experienced, or have had an opportunity to reflect upon, the hazards and inconvenience of being witnesses. Even these victims usually are most adamant, immediately after the crime has occurred, about apprehending and punishing the perpetrators.

We do not contend that a warrantless search and forcible entry over the objections of the occupant would be permissible, *Colonnade Catering Corp v. United States*, 397 US 72 (1970), or that warrantless searches are not subject to the Fourth Amendment requirement of reasonableness. *United States v. Edwards*, 415 US 800, 808 n. 9 (1974). We concede that, if one affirmatively asserts his property rights as a bar to an inspection of his burned-out premises, a warrant should be obtained.

the fire is out,[8] they will observe the apparent focal point of the blaze to determine its source, and will examine that area for clues as to how the fire started. They will inspect any gas, fuel oil, or electrical lines and fixtures in the area, and if pipes or vents lead somewhere else (e.g., a vent leading to a furnace in the basement) they will extend their investigation to any area of a possible malfunction. Even when a mixture of curiosity and suspicion leads an investigator to gather evidence with a view toward possible prosecution, his motivation is not likely to control the scope and relative intrusiveness of

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[8] While firemen must do some "investigating" while they are fighting a fire simply to locate its source and eliminate its cause (and the potential cause of a recurring fire), the decision below, requiring an administrative search warrant, puts a premium on as thorough an investigation as is possible during the "exigent circumstances" stage of firefighting. Fire investigators will be encouraged to gather as much evidence as possible during the last stages of active firefighting, while there is danger of water and smoke damage to evidence. *United States v. Gargotto*, 510 F2d 409 (CA6, 1974), but also while steps and floors are slipperiest and carry the greatest danger of injury to firemen. That is also the time when smoke and steam make visibility its worst, with the attendant dangers of falling ceilings and collapsing floors. See *Wall Street Journal*, Vol. LVII, No. 251 (October 6, 1977), pp. 1, 20.

his search for the cause or origin of the fire, which is limited by its nature to burnt areas and possible sources of combustion. Though it will be detailed and focused in its technical aspect, it will be narrow and unobtrusive in its potential for abuse and invasion of privacy.[9] Insofar as the contact between citizens and official investigators will come when the citizens are regarded as victims, not as suspected criminals, much of the rationale for Fourth Amendment protection is absent.

The court below would require an administrative search warrant to protect whatever privacy interest may remain in burned premises. Yet in requiring administrative search warrants for area inspections, this Court relied heavily upon factors which distinguish *Camara* and *See* from the instant case. Where the homeowner or occupant may have no way of knowing the purpose or lawfulness of a routine building, fire, or health code inspection, the need to search for the cause or origin of an actual fire is obvious to anyone. There is no need to search for code violations at any particular time, whereas the timing of a post-fire inspection, after smoke and steam have dissipated but at the first

[9] This generalization is not meant to be absolute. If investigators are suspicious of arson for profit, they will be interested in the type of goods, clothing, and furnishings remaining on the premises. Such a search could extend into constitutionally protected areas of privacy, such as closets, but those areas are constitutionally protected only if the investigator's suspicions turn out to be unfounded. This possibility is remote though real, but Petitioner contends that, if the occupants of the home are not present, the investigators will look there if they are curious enough, with or without a warrant, and regardless of whether such an inspection is within the scope of the warrant. If the occupants *are* present, they will consent to, acquiesce in, or object to the search, and any search and seizure question will likely turn upon their reaction to that search.

opportunity for a thorough daylight visual examination of the scene, is an important element of the need to search. The general condition of the area, the passage of time since the last inspection, and the type of building involved are all irrelevant to post-disaster investigations. The "condition of the particular dwelling" or structure is important for the fact that a fire has occurred, and this alone should be sufficient to justify issuance of an administrative search warrant. But the fact of a fire is so readily ascertainable that there seems to be little need for individualized review. The judgment or discretion of anyone, much less of a disinterested magistrate, is unnecessary to determine its occurrence.[10]

While *Camara* and *See* dealt with the sanctity of occupied homes and the private portions of operational businesses, this case deals with permanently or temporarily uninhabitable premises which already have been disastrously disrupted and lawfully invaded to such a degree that any remaining expectation of privacy is likely to be negligible.[11] To the extent that it exists, it is not likely to be intruded upon by inspections of gas, fuel oil, or electrical systems, or of burnt areas of the home

[10] There is no realistic possibility that police or fire officials would fabricate a story of a fire that never occurred, and the credibility of the affiant will not be at issue in any meaningful sense.

[11] Because of these extensive contacts, post-fire searches seem akin to those in *United States v. Biswell*, 406 US 311 (1972), and *Cady v. Dombrowski*, 413 US 433 (1973), wherein the warrantless searches were justified at least in part by the fact that federally licensed firearms dealers (*Biswell*) and motor vehicles (*Cady v. Dombrowski*) already had such extensive legitimate contacts with law enforcement personnel that there was a reduced expectation of privacy in the highly regulated premises.

or business. Fire insurance policies often contain a clause requiring the insured to allow inspection of the premises by an agent of the insurance company,[12] as did Respondent Tyler's contracts (D. Ex. P & Q), indicating further a diminished prospect of privacy in burned premises. Finally, the frequency of state statutes allowing warrantless searches for the cause or origin of fires[13] suggests that such searches are widely regarded as reasonable.

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[12] E.g., Ariz Rev Stat 20-1503; Cal Code, Ins §2071; Conn Gen Stat Ann, §38-98; Ga Code Ann §56-3201; Haw Rev Stat §431-420; Ida Code §41-2401; Iowa Code Ann §515.138; La Stat Ann 22:691; Mich Comp Laws, 500.2832; Neb Rev Stat §44-501; NH Rev Stat Ann 407:22; NJ Stat Ann 17:36 - 5.20; NM Stat Ann 58-8-10; NY Consol Laws, Ins Law §168; NC Gen Stat §58-176; ND Cen Code 26-03-40; Okla Stat Ann 36 §4803; Pa Stat Ann, 40 §636; RI Gen Laws 27-5-3; Va Code Ann §38.1-366; WV Code Ann 33-17-2; Wisc Stat Ann 203.01

[13] Ala Code, 55 §34; Ark Stat Ann, 82-817; Cal Code, H & S, 13107, 13109; Colo Rev Stat 32-5-341; Conn Gen Stat Ann 29-57; Del Code 16, §6607 (f); Ga Code Ann, 92A-723; Haw Rev Stat, §132-5; Ill Rev Stat, 127½ §6; Iowa Code Ann, 100.2, 100.10, 100.12; Kan Stat Ann, 31-137; Ky Rev Stat 227.240; La Stat Ann 40:1566; Maine Rev Stat Ann 25 §2394; Md Code Ann, 38A §8 (f); Mass Gen Laws Ann 148 §2; Mich Comp Laws, §29.6; Minn Stat Ann, 299F.04, 299F.08; Miss Code Ann §45-11-1; Mont Rev Code §§82-1209, 82-1217; Neb Rev Stat §§81-506, 81-511; NM Stat Ann §4-16-8; NC Gen Stat §69-1; Oh Rev Code, §3737.08; Okla Stat Ann 74.314; Ore Rev Stat, 476.070(1); Pa Stat Ann, 53 §16598; RI Gen Laws §23-28.2-10; SC Code §37-84; SD Law 34-32-5; Vt Stat Ann T20 §§2861, 2863; Va Code, 27-56; 27-58; Wash Rev Code Ann §48.48.030; WV Code Ann §29-3-12; Wisc Stat Ann §165.55 (a); Wyo Stat Ann §§35-422, 35-425.

Only Michigan and Indiana[14] require a search warrant for an investigation of fire-damaged premises. Other state[15] and federal[16] courts have permitted warrantless searches for the source of a fire, though the decisions sometimes strain to uphold the search as pursuant to an exigent circumstance. Since an arsonist will never suffer an intrusion into a constitutionally protected area by a search of fire-damaged premises, and since the possibility that victims will resent such an inspection or will thereby suffer an invasion of what little is left of their privacy in such premises is very slight, this Court should hold that such warrantless searches are permissible.

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[14] *State v. Buxton*, 238 Ind 93; 148 NE2d 547 (1958). Though there is an apparent split of authority in California, cf. *Romero v. Superior Court*, 266 Cal App 2d 714; 72 Cal Rptr 430 (1968), with *Swan v. Superior Court*, 8 Cal App 3d 392; 87 Cal Rptr 280 (1970), the most recent case, *People v. Saling*, 48 Cal App 3d 724; 122 Cal Rptr 1, 13-14 (1975), suggests that a warrantless investigation after the fire has been extinguished is permissible.

[15] *State v. Cohn*, 347 SW2d 691 (Mo, 1961); *Bennett v. Commonwealth*, 212 Va 863; 188 SE2d 215 (1972); *Stone v. Commonwealth*, 418 SW2d 646, 652 (Ky App, 1967); *State v. Rees*, 258 Iowa 813; 139 NW2d 406 (1966); *State v. Murdock*, 160 Mont 95; 500 P2d 387 (1972); *State v. Vader*, 114 NJ Super 260; 276 A2d 151 (1971); *State v. Felger*, 19 Or App 39; 526 P2d 611 (1974); *People v. Patrick*, 41 Ill App 3d 1037; 355 NE2d 224 (1976).

[16] *United States v. Gargotto*, 510 F2d 409 (CA6, 1974); *United States v. Green*, 474 F2d 1385 (CA5, 1973); *Steigler v. Anderson*, 360 F Supp 1286 (D Del, 1973), *aff'd*, 496 F2d 793 (CA3, 1974); *Bailey v. Michigan*, 493 F2d 1218 (CA6, 1974).

II.

A WARRANTLESS SEARCH OF FIRE-DAMAGED PREMISES TO GATHER EVIDENCE OF THE CAUSE OR ORIGIN OF THE FIRE, CONDUCTED UNDER CIRCUMSTANCES WHICH INDICATED THAT THE OCCUPANT HAD NO EXPECTATION OF PRIVACY IN THOSE PREMISES, WAS CONSTITUTIONALLY PERMISSIBLE, NOTWITHSTANDING THAT NO EXIGENT CIRCUMSTANCES EXISTED, THAT OFFICERS HAD WITHIN THEIR KNOWLEDGE FACTS UNQUESTIONABLY SHOWING PROBABLE CAUSE, AND THAT OFFICERS HAD AMPLE TIME TO GET A SEARCH WARRANT.

Sergeant Hoffman conducted a search of the burned-out building on February 16, three and one-half weeks after the fire and two and one-half weeks after having examined the premises with Respondent Tyler. At that time Hoffman seized a piece of fuse, pieces of glass, and other debris, all of which were admitted at trial over objection. Since those items could have been seized from the premises on the morning following the fire, we contend that if our analysis in Part I, *supra*, is accepted, this later search should be regarded merely as a continuation of a search valid at its inception. If officers at a later time conduct or continue a warrantless search which does not exceed the scope of that which they were allowed to conduct earlier, the passage of time is of no constitutional significance. *United States v. Edwards*, 415 US 800 (1974).

Whether the investigators failed to get a warrant for this search because of carelessness, contempt for constitutional rights, or because they reasoned intuitively that the premises had been abandoned cannot be determined from this record. The thought of obtaining a warrant seems never to have occurred to them. By the time of the search, Oscar Frisch had already implicated both Respondents by describing the elaborate preparations for the burning.[17] There was, of course, ample time to obtain a warrant, and there were no exigent circumstances. While the officers should have obtained a warrant, we contend that they should have done so for reasons of prudent and careful police work, not because a warrant was constitutionally required.

The repeated statements by this Court to the effect that, "[E]xcept in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant,"[18] rest upon the implied premise that one raising the issue can complain of the violation of one of his constitutional rights. Since we contend that the record shows beyond a reasonable doubt that Respondent Tyler burned his own premises, that he thereby abandoned those premises within the meaning of

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[17] He first gave his story to Detective Webb on January 31, 1970 (R.265).

[18] *Camara v. Municipal Court, supra*, at 528-529, and cases cited therein.

the Fourth Amendment, and that police and fire officials knew of his culpability at the time of the February 16 search, the only question remaining is whether a disinterested magistrate should have made a determination on the question of abandonment before the search took place.

The Fourth Amendment requires that a neutral magistrate determine the question of probable cause, of "[w]hen the right of privacy must reasonably yield to the right of search. . ." *Johnson v. United States*, 333 US 10, 14 (1948). By contrast, it has never been held that a neutral magistrate need make an antecedent determination of whether a proposed search is likely to intrude upon a constitutionally protected area, notwithstanding that such a requirement would provide at least an increment of protection for those whose premises were searched after officers had wrongly estimated that their actions were unobtrusive. In general, the police are free to conduct any investigation as they see fit, so long as no individual rights are violated in the process.

Even when there has been ample opportunity to obtain a warrant, it has never been suggested that a magistrate first pass upon the question of consent, *Zap v. United States*, 328 US 624 (1946), vacated on other grounds, 330 US 800 (1947); *Bumper v. North Carolina*, 391 US 543 (1968); of whether a car was properly seized pursuant to forfeiture proceedings, *Cooper v. California*, 386 US 58 (1967), or was being safeguarded or inventoried pursuant to standard procedures, *Harris v. United States*, 390 US 234 (1968); *South Dakota v. Opperman*, 428 US 364 (1976); of whether a search was conducted in "open

fields" rather than within the curtilage of a structure, *Hester v. United States, supra*; *Air Pollution Variance Board v. Western Alfalfa, supra*; or, as in the instant case, of whether the premises searched or the items seized had been abandoned within the meaning of the Fourth Amendment, *Hester v. United States, supra; Abel v. United States*, 362 US 217 (1960).[19]

Because officers had probable cause and ample time to obtain a warrant, and were faced with no exigency, this second search closely resembles those in which this Court has required that a warrant be obtained. Were the focus in this case to be exclusively upon the

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[19] The United States Courts of Appeals have repeatedly allowed the searching officers to determine the question of abandonment, subject only to subsequent judicial scrutiny, e.g., *Rees v. Peyton*, 341 F2d 859, 863 (CA4, 1965) (en banc) (hidden suitcase); *Friedman v. United States*, 347 F2d 697 (CA8), *cert den*, 382 US 946 (1965) (leasehold abandoned); *Elledge v. United States*, 359 F2d 404 (CA9, 1966) (package); *Argo v. United States*, 378 F2d 301 (CA9, 1967) (apartment tenancy); *United States v. Cowan*, 396 F2d 83, 87 (CA2, 1968) (luggage left at hotel); *United States v. Dzialak*, 441 F2d 212 (CA2, 1971) (garbage); *United States v. Kress*, 446 F2d 358 (CA9), *cert den* 404 US 947 (1971) (tenancy); *United States v. Jackson*, 448 F2d 963, 970-971 (CA9, 1971), *cert den sub nom Willis v. United States*, 405 US 924 (1972) (motel room); *United States v. Wilson, supra* (tenancy); *United States v. Brown*, 473 F2d 952 (CA5, 1973) (interior of buried suitcase); *United States v. Colbert*, 474 F2d 1974 (CA5, 1973) (en banc) (suitcases); *United States v. Edwards*, 441 F2d 749 (CA5, 1971) (defendant flees automobile during chase); *United States v. Moody*, 485 F2d 531 (CA3, 1973) (same), even where the officers were not aware of facts sufficient to show abandonment at the time of the search. *Feguer v. United States*, 302 F2d 214 (CA8), *cert den*, 371 US 872 (1962) (tenancy); *Parman v. United States, supra* (same).

officials' conduct, a close question would be presented. We contend that the approach should be two-fold, so as to focus as well upon the presence or absence of the violation of a constitutional right. Cf. *United States v. Edwards*, 415 US 800 (1974). The fact remains that the record shows a clear abandonment of any interest entitled to constitutional protection. If this Court is ever to make an abrupt break with all past decisions, and for the first time hold that one may benefit from the Fourth Amendment exclusionary rule without first showing that he is the victim of a constitutional violation, but rather by arguing that the rights of others might have been violated under similar, though abstract and hypothetical circumstances, it should do so in a case in which the hypothetical Fourth Amendment violation is a serious one. One, in other words, in which the privacy interest which might be intruded upon is substantial, not slight; in which the police conduct is egregious and flagrantly abusive, not relatively innocuous; and in which innocent property owners are likely to be seriously aggrieved, rather than one in which resentment or apprehension of a possible invasion of privacy is likely to be the farthest thing from their minds. A case involving a post-fire investigation is not such a case.

III

THE PROSECUTION SHOULD BE ENTITLED TO A DECISION ON THE MERITS OF A QUESTION OF STANDING AT ANY STAGE OF THE CRIMINAL PROCEEDINGS.

Respondent Tompkins was not on the premises at the time of the contested searches, was not charged with a possessory offense, and appears to have had no

proprietary or possessory interest in Tyler's action. He lacks standing to raise the issue of an unconstitutional search and seizure under this Court's holding in *Brown v. United States, supra.*[20]

The prosecution failed to raise this issue in the trial court and in the Michigan Court of Appeals, and can offer no good reason for having failed to do so. The Michigan Supreme Court refused to consider the issue on the merits, 399 Mich at 571; 250 NW2d at 470-471; Pet. at 19-20, although under Michigan law it has the power to consider any question not properly raised and preserved in order to prevent a serious injustice. *People v. Crittle*, 390 Mich 367, 370-371; 212 NW2d 196, 197-198 (1973); *People v. Moore*, 391 Mich 426, 431; 216 NW2d 770, 773 (1974). Under these circumstances, this Court has jurisdiction to decide the substantive issue. *Williams v. Georgia*, 349 US 375, 382-389 (1955).

We contended in our petition for certiorari that, "Respondent Tompkins was not prejudiced in any way by the prosecution's failure to raise this issue in a timely manner" (Pet. 16). That is incorrect because, though he had to endure the trial and appellate process nonetheless, had the issue been raised at trial he would have been entitled to an opportunity to establish his standing at a hearing. *Simmons v. United States*, 390 US 377 (1968). Accordingly, should one or both of the search and seizure issues in this case be decided in Respondents' favor, we ask not for a decision on the merits of the standing issue but rather for a *Simmons* hearing in the

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[20] This issue was poorly framed in the petition for certiorari, in that the question answered itself. We believe the present framing of the issue more clearly reflects the argument actually put forward in the petition.

trial court. Should Respondent Tompkins fail to establish standing at that hearing, his judgment of conviction should be reinstated.

Though the prosecution rarely if ever is granted the procedural latitude allowed defendants in raising federal questions, this waiver rule should be relaxed when two factors coincide: (1) a serious miscarriage of justice will result if the federal question is not decided; and (2) no federal right of the defendant will have been violated.

A finding of no standing would mean, of course, that Respondent Tompkins' Fourth Amendment rights have not been violated. He would be given his right to a *Simmons* hearing upon remand.

The public interest requires that those duly convicted, by a process in which none of their rights have been violated, remain convicted. Should Respondents' position on the search and seizure issues prevail, and should Tompkins in fact lack standing, the reversal of his judgment of conviction would entitle him to a retrial identical in all constitutional respects to his original trial. This would involve a vast expenditure of judicial resources, an undeserved second chance at a not guilty verdict, and a prosecution case likely to have been weakened by the passage of over seven years. This injustice can be avoided by allowing the prosecution a *Simmons* hearing, with instructions to reinstate the judgment of conviction should no standing be found.

CONCLUSION

WHEREFORE, Petitioner respectfully requests that this Honorable Court reverse the judgment of the Supreme Court of the State of Michigan on the Fourth Amendment issues presented. If that judgment is upheld, Petitioner requests in the alternative that a hearing on the standing issue be ordered, with instructions to reinstate Respondent Tompkins' judgment of conviction should no standing be found.

Respectfully submitted,

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